Supreme Court, U.S.
FILED

01 403 SEP 05 2001

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

CHELO HENRY VILLARREAL-ALARCON, ROXANA C. VILLARREAL, ITALO H. VILLARREAL, GINO A. VILLARREAL,

Petitioners,

v.

JOHN ASHCROFT, Attorney General,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

ARIELLE BASES, ESQ.
Counsel of Record
LAW OFFICE OF ARIELLE BASES
16633 Ventura Boulevard, Suite 1200
Encino, CA 91436
(818) 905-1144

ENRIQUE AREVALO, ESQ.
LAW OFFICE OF ENRIQUE AREVALO
505 Mission St.
South Pasadena, CA 91030
(626) 799-6585

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

47 pp

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE NINTH CIRCUIT COURT OF APPEALS ERRED IN SUMMARILY DISMISSING PETITIONERS' PETITION FOR RELIEF FROM DEPORTATION SOLELY ON THE BASIS OF IIRIRA SECTION 309(C)(5) AS AMENDED BY NACARA SECTION 203(A) BECAUSE SAID SECTION IS IMPERMISSIBLY RETROACTIVE FOR APPLICANTS WHO WERE IN DEPORTATION PROCEEDINGS AND STATUTORILY ELIGIBLE FOR SUSPENSION RELIEF PRIOR TO APRIL 1, 1997 BUT WHO DID NOT HAVE THE MERITS OF THEIR CASES HEARD UNTIL AFTER IIRIRA SECTION 309(C)(5) BECAME EFFECTIVE.

II. WHETHER THE NINTH CIRCUIT COURT OF APPEALS CASELAW HAS CREATED A SITUATION WHICH VIOLATES THE EQUAL PROTECTION RIGHTS OF APPLICANTS SUCH AS THE VILLAR-REALS WHO WERE IN PROCEEDINGS AND HAD ACQUIRED THE REQUISITE SEVEN YEARS' CONTINUOUS PRESENCE PRIOR TO APRIL 1, 1997 BUT WERE UNABLE TO HAVE THEIR CASES HEARD UNTIL AFTER IIRIRA BECAME EFFECTIVE.

LIST OF PARTIES

1. Henry Chelo Villarreal, Roxana Villarreal, Italo C. Villarreal, Gino A. Villarreal

2. John Ashcroft, Attorney General

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

LIST OF PARTIES ii

PETITION FOR WRIT OF CERTIORARI..... 1

OPINIONS BELOW..... 1

JURISDICTIONAL STATEMENT..... 1

STATUTORY PROVISIONS INVOLVED..... 2

STATEMENT OF THE CASE..... 3

REASONS FOR GRANTING THE WRIT 6

I. THE NINTH CIRCUIT COURT OF APPEALS ERRED IN SUMMARILY DISMISSING PETITIONERS' PETITION SOLELY ON THE BASIS OF IIRIRA SECTION 309(c)(5) AS AMENDED BY NACARA SECTION 203(A) BECAUSE SUCH INTERPRETATION CREATES AN IMPERMISSIBLY RETROACTIVE EFFECT FOR APPLICANTS WHO WERE IN DEPORTATION PROCEEDINGS AND STATUTORILY ELIGIBLE FOR SUSPENSION RELIEF PRIOR TO APRIL 1, 1997 BUT DID NOT HAVE THE MERITS OF THEIR CASES HEARD UNTIL AFTER THAT DATE 6

1. CONGRESS DID NOT INDICATE WITH THE REQUISITE CLARITY THAT IIRIRA SECTION 309(c)(5) SHOULD BE APPLIED RETROACTIVELY TO ALL SUSPENSION OF DEPORTATION CASES 8

TABLE OF CONTENTS – Continued

Page

2. DEPRIVING ALIENS OF SUSPENSION RELIEF PRODUCES AN IMPERMISSIBLY RETROACTIVE EFFECT FOR ALIENS, SUCH AS THE VILLARREALS, WHO WERE STATUTORILY ELIGIBLE FOR SUSPENSION RELIEF PRIOR TO APRIL 1, 1997 BUT DID NOT HAVE THE MERITS OF THEIR CASE HEARD PRIOR TO THAT DATE 15

II. THE NINTH CIRCUIT COURT OF APPEALS CASELAW HAS CREATED A SITUATION WHICH VIOLATES THE EQUAL PROTECTION RIGHTS OF APPLICANTS SUCH AS THE VILLARREALS WHO WERE IN PROCEEDINGS AND STATUTORILY ELIGIBLE FOR SUSPENSION OF DEPORTATION PRIOR TO APRIL 1, 1997 BUT WERE UNABLE TO HAVE THEIR CASES HEARD UNTIL AFTER IIRIRA BECAME EFFECTIVE 17

CONCLUSION 22

TABLE OF AUTHORITIES

Page

Supreme Court Cases

Fiallo v. Bell, 430 U.S. 787 (1977) 17

F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920) 17

Hughes Aircraft Co. v. United States ex rel. Schumer, 520 U.S. 939 (1997) 16

INS v. St. Cyr, 121 S.Ct. 2271 (2001) 7, 8, 15, 16

Kleindiest v. Mandel, 408 U.S. 753 (1972) 17

Landgraf v. USI Film Products, 511 U.S. 244 (1994) 15

Lindh v. Murphy, 521 U.S. 320 (1997) 8

Matthews v. Diaz, 426 U.S. 67 (1976) 17

Circuit Court Cases

Ablang v. Reno, 52 F.3d 801 (9th Cir. 1995) 17

Astrero v. INS, 104 F.3d 264 (9th Cir. 1996) 6

Barahona-Gomez v. Reno, 167 F.3d 1228 (9th Cir. 1999) 4, 19

Guadalupe-Cruz v. INS, 240 F.3d 1209 (9th Cir. 2001) 5, 6, 18, 19

Ram v. INS, 243 F.3d 510 (9th Cir. 2001) ..... *passim*

Board of Immigration Appeals Decisions

Matter of N-J-B-, Int. Dec. 3309 (BIA 1997) 14

TABLE OF AUTHORITIES – Continued

Page

STATUTES

IIRIRA Section 309(a) 9

IIRIRA Section 309(c) ..... *passim*

Immigration and Nationality Act Section 212(a)(2) 10

Immigration and Nationality Act Section 237(a) 10

Immigration and Nationality Act Section 239(a) 10, 13, 14

Immigration and Nationality Act Section 240A .. *passim*

Immigration and Nationality Act Section 242(B).. 9, 10, 12

NACARA Section 203(a) 6, 7

PETITION FOR WRIT OF CERTIORARI

Petitioners, Chelo Henry Villarreal-Alarcon, Roxana C. Villarreal, Italo C. Villarreal, and Gino A. Villarreal ("the Villarreals") respectfully request that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals in and for the Ninth Circuit, entered on June 8, 2001, in the above-entitled proceeding.

OPINIONS BELOW

In the Matters of Chelo Henry Villarreal-Alarcon, Roxana C. Villarreal, Italo Villarreal, Gino Villarreal, Oral Decision of the Immigration Judge, December 1, 1997.

In re Villarreal, Order, Board of Immigration Appeals, March 31, 2000.

Villarreal v. INS, Unpublished Opinion, United States Court of Appeals for the Ninth Circuit, filed March 28, 2001.

Villarreal v. INS, Order, United States Court of Appeals for the Ninth Circuit, filed June 8, 2001.

JURISDICTIONAL STATEMENT

The Ninth Circuit Court of Appeals dismissed Petitioners' petition for review on March 28, 2001. Petitioners filed a Petition for Rehearing which was summarily dismissed on June 8, 2001. This Court has jurisdiction to

review the Ninth Circuit Court of Appeals' dismissal pursuant to 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

IIRIRA Section 309(c)(5)

(5) TRANSITIONAL RULES WITH REGARD TO SUSPENSION OF DEPORTATION –

(A) IN GENERAL – Subject to subparagraphs (B) and (C), paragraphs (1) and (2) of section 240A(d) of the Immigration and Nationality Act (relating to continuous residence or physical presence) shall apply to orders to show cause (including those referred to in section 242B(a)(1) of the Immigration and Nationality Act), as in effect before [April 1, 1997], issued before, on, or after the date of enactment of this Act [September 30, 1996].

(B) EXCEPTION FOR CERTAIN ORDERS – In any case in which the Attorney General elects to terminate and reinitiate proceedings in accordance with paragraphs (1) and (2) of Section 240A(d) of the Immigration and Nationality Act shall not apply to an Order to Show Cause issued before April 1, 1997.

Immigration and Nationality Act Section 240A(d)

(1) For purposes of this section, any period of continuous physical presence in the United States shall be deemed to end when the alien is served a notice to appear under section 239(a) or when the alien has committed an offense referred to in section 212(a)(2) that renders the alien inadmissible . . . or removable from the

United States under section 237(a)(2) or 237(a)(4), whichever is earliest.

(2) An alien shall be considered to have failed to maintain continuous physical presence in the United States under subsection (b)(1) and (b)(2) if the alien has departed from the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days.

STATEMENT OF THE CASE

The Villarreals are natives and citizens of Peru. They entered the United States on October 26, 1989. The Immigration and Naturalization Service ("Service") issued orders to show cause ("OSCs") on September 7, 1995, placing them in deportation proceedings.

On March 28, 1996, the Villarreals appeared before the Immigration Judge, admitted the factual allegations in the OSC and conceded the charge of deportability. At that hearing, Respondents requested relief in the form of suspension of deportation. The matter was continued to October 28, 1996 for a hearing on the applications for suspension of deportation. As of October 28, 1996, the Villarreals had the seven years' continuous presence and IIRIRA Section 309(c)(5) was not yet in effect. Therefore, from October 28, 1996 until April 1, 1997, the Villarreals were statutorily eligible for suspension of deportation relief.

The October 28th hearing was reset to November 27, 1996 as the Immigration Judge was unavailable on October 28th. On November 27, 1996, the Petitioners submitted their suspension applications with supporting documents. The case was then rescheduled for June 19, 1997.

Before the next hearing date, the law on continuous presence in suspension cases changed drastically. On February 11, 1997, Judge Creppy issued a memo which prohibited the granting of suspension cases because IIRIRA Section 309(c)(7) had imposed a cap of 4000 suspension grants effective April 1, 1997. Subsequent amendments to the statute demonstrate that the cap did not apply to cases prior to April 1, 1997. *Barahona-Gomez v. Reno*, 167 F.3d 1228 (9th Cir. 1999).

On April 1, 1997, IIRIRA Section 309(c)(5) went into effect, providing that in order to satisfy the seven-year continuous presence requirement, an applicant must have accumulated seven years' presence from their date of entry and before the issuance of an OSC. The issuance of the OSC cuts off the time.

On June 18, 1997, the Immigration Judge granted a motion to continue the case to December 1, 1997. On December 1, 1997, the Immigration Judge denied the suspension applications solely based on the 309(c)(5) issue – namely that between the date of the Villarreals' entry into the United States and the issuance of the OSC, the Villarreals had not accumulated seven years' continuous presence. She did specifically state that "These are very favorable applications. I'm very impressed with the family, the written form already and I have no doubts

that they could be consistent orally, how be it they choose not to make an advisory decision. I have no choice today, however, because the law is very severe and is still being interpreted in that matter." See Oral Decision and Order, App. 3-5.

On December 16, 1997, the Villarreals filed a timely Notice of Appeal with the Board of Immigration Appeals. They submitted a brief in support of that appeal on June 19, 1998. On March 31, 2000, the Board of Immigration Appeals dismissed the appeal.

The Villarreals then filed a petition for review with the Ninth Circuit Court of Appeals.

While this appeal was pending, *Ram v. INS*, 243 F.3d 510 (9th Cir., February 8, 2001) was published. This case held that

> IIRIRA Section 309(c)(5) generally applies the stop-time rule to transitional rule aliens whose deportations were initiated with the service of an OSC and who seek suspension of deportation. *Ram v. INS*, 243 F.3d 510, 516 (9th Cir. February 8, 2001).

On March 28, 2001, the Ninth Circuit Court of Appeals denied the petition based on the *Ram* holding. See denial, App. 1-2.

However, the law on retroactive application of Section 309(c)(5) has not yet been settled. After *Ram*, the Ninth Circuit published its decision *Guadalupe-Cruz v. INS*, 240 F.3d 1209 (9th Cir., February 27, 2001). This case held that IIRIRA Section 309(c)(5) could not be applied retroactively to a case heard by an Immigration Judge before IIRIRA's date of enactment (April 1, 1997). In

Guadalupe-Cruz, the Ninth Circuit Court of Appeals cited *Astrero v. INS*, 104 F.3d 264 (9th Cir. 1996) (holding that IIRIRA Section 309(c)(5) does not apply to individuals in proceedings before April 1, 1997).

On April 6, 2001, Petitioners filed a petition for rehearing discussing the changes in the law since the *Ram* holding.

On June 8, 2001, the Ninth Circuit Court of Appeals summarily denied the petition for rehearing. See denial, App. 18.

On July 6, 2001, Petitioners filed a writ of habeas corpus and a request for a stay of deportation. The District Court has granted a stay of deportation. The writ of habeas corpus is currently pending.

REASONS FOR GRANTING THE WRIT

I.

THE NINTH CIRCUIT COURT OF APPEALS ERRED IN SUMMARILY DISMISSING PETITIONERS' PETITION SOLELY ON THE BASIS OF IIRIRA SECTION 309(c)(5) AS AMENDED BY NACARA SECTION 203(A) BECAUSE SUCH INTERPRETATION CREATES AN IMPERMISSIBLY RETROACTIVE EFFECT FOR APPLICANTS WHO WERE IN DEPORTATION PROCEEDINGS AND STATUTORILY ELIGIBLE FOR SUSPENSION RELIEF PRIOR TO APRIL 1, 1997 BUT DID NOT HAVE THE MERITS OF THEIR CASES HEARD UNTIL AFTER THAT DATE.

The decision of the Ninth Circuit Court of Appeals is legal error because by its plain language, IIRIRA Section

309(c)(5), as amended by NACARA Section 203(a) (the "stop-time rule"), does not apply to Petitioners. The statute only applies to applications for cancellation of removal, and not to suspension of deportation applications, such as those of Petitioners. Even if IIRIRA Section 309(c)(5) could apply to suspension of deportation cases in general, the statute should not apply to the present case where the Petitioners were in proceedings prior to April 1, 1997, had accumulated seven years' continuous presence prior to April 1, 1997, and never had a merits hearing[1] because their cases were continued until some date after IIRIRA became effective.

As such, the Ninth Circuit Court of Appeals erred in summarily dismissing the petition and denying suspension of deportation on the sole ground that the service of the OSC terminated their ability to demonstrate seven years of continuous physical presence.

The Ninth Circuit Court of Appeals as well as other Circuit Courts of Appeals have addressed the issue of the retroactivity of IIRIRA Section 309(c)(5) as it applies to suspension of deportation cases. However, the Circuits have not addressed retroactivity using the standards laid out in *INS v. St. Cyr*, 121 S.Ct. 2271 (2001). Nor have they addressed retroactivity as it pertains to cases in which an applicant for suspension of deportation was statutorily eligible for relief prior to April 1, 1997 but did not have

---

[1] In the present case, Petitioners *never* had a merits hearing. In *Ram v. INS*, the Petitioners had a merits hearing before they had accumulated seven years. While their case was on appeal, they accumulated the seven years and then had their case remanded on those grounds.

his/her merits heard until after that date. As discussed below, IIRIRA Section 309(c)(5) as interpreted by *Ram* creates an impermissibly retroactive effect in these cases.

1.

CONGRESS DID NOT INDICATE WITH THE REQUISITE CLARITY THAT IIRIRA SECTION 309(c)(5) SHOULD BE APPLIED RETROACTIVELY TO ALL SUSPENSION OF DEPORTATION CASES.

This Court has recently found that although Congress has the power to enact laws with retroactive effect, "a statute may not be applied retroactively . . . absent a clear indication from Congress that it intended such result." *INS v. St. Cyr*, 121 S.Ct. 2271 (2001). This Court further found that:

> The standard for finding such unambiguous direction is a demanding one. '[C]ases where this Court has found truly 'retroactive' effect adequately authorized by statute involved statutory language that was so clear that it could sustain only one interpretation.' *Id.* citing *Lindh v. Murphy*, 521 U.S. 320, 328, n. 4 (1997).

The Ninth Circuit Court of Appeals found that Congress showed a clear intent to apply the stop-time rule retroactively and that therefore, no further inquiry into the consitutionality of retroactive application of the statute is required. *Ram v. INS*, 243 F.3d 510, 517. However, the language in IIRIRA Section 309(c)(5) does not meet the standard for clarity as articulated in *St. Cyr*.

Congress created a special transitional rule, IIRIRA Section 309(c) for certain suspension applicants placed in

proceedings prior to April 1, 1997, the effective date for the new provisions. *See* IIRIRA Section 309(a). IIRIRA Section 309(c) contain specific exceptions to Section 309(a) for aliens in proceedings prior to the April 1, 1997 effective date for the new provisions. That rule contains specific exceptions to the general rule that the new provisions of IIRIRA not be applied to cases pending on April 1, 1997. One transitional rule relevant to applications for suspension of deportation, IIRIRA Section 309(c)(5), was amended by NACARA. The amendment was deemed to be effective as if included in IIRIRA. Section 309(c)(5) now reads, in relevant part:

> (5) TRANSITIONAL RULES WITH REGARD TO SUSPENSION OF DEPORTATION –
>
> (A) IN GENERAL – Subject to subparagraphs (B) and (C), paragraphs (1) and (2) of section 240A(d) of the Immigration and Nationality Act (relating to continuous residence or physical presence) shall apply to orders to show cause (including those referred to in section 242B(a)(1) of the Immigration and Nationality Act), as in effect before [April 1, 1997], issued before, on, or after the date of enactment of this Act [September 30, 1996].
>
> (B) EXCEPTION FOR CERTAIN ORDERS – In any case in which the Attorney General elects to terminate and reinitiate proceedings in accordance with paragraphs (1) and (2) of Section 240A(d) of the Immigration and Nationality Act shall not apply to an Order to Show Cause issued before April 1, 1997.

As enacted by IIRIRA, new Immigration and Nationality Act (hereinafter "INA") Section 240A(d), in turn

specifies the manner in which "continuous physical presence" is to be computed:

> (1) *For purposes of this section,* any period of continuous physical presence in the United States shall be deemed to end when the alien is *served a notice to appear under section 239(a)* or when the alien has committed an offense referred to in section 212(a)(2) that renders the alien inadmissible . . . or removable from the United States under section 237(a)(2) or 237(a)(4), whichever is earliest.
>
> (2) An alien shall be considered to have failed to maintain continuous physical presence in the United States under subsection (b)(1) and (b)(2) *if the alien has departed from the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days.*

INA Section 240A(d) (1) and (2) (emphases added).

In the present case, the Ninth Circuit Court of Appeals summarily dismissed the petition solely on statutory ineligibility, citing IIRIRA Section 309(c)(5) and its own incorrect decision, *Ram v. INS*, 243 F.3d 510 (9th Cir. 2001). The Ninth Circuit Court of Appeals' decision was in error because the new provisions under INA Section 240A(d) (1) and (2) do *not* apply to applicants, like the Villarreals, who were applying for suspension of deportation. *See* IIRIRA Section 309(c)(1)(A) and (B).

Current IIRIRA Section 309(c)(5) specifies that INA Section 240A(d)(1) applies to "orders to show cause (including those referred to in section 242B(a)(1) of the [INA], as in effect before April 1, 1997]), issued before,

on, or after the date of [IIRIRA's] enactment." This language does not in any way indicate that the stop-time rule applies to *all* orders to show cause. On the contrary, IIRIRA Section 309(c)(5)(A)'s language that Section 240A(d) "shall apply to orders to show cause" can have only the following possible meanings:

> (1) INA Section 240A(d) applies only to those cases where IIRIRA Section 309(c)(2) is invoked;[2] or, in the alternative,
>
> (2) INA Section 240A(d) applies to deportation proceedings (initiated by Orders to Show Cause) by deeming the period of continuous physical presence to end when the applicant has committed a relevant criminal offense that renders him or her deportable (Section 240A(d)(1)), or when the applicant has certain absences (Section 240A(d)(2)).

The only way that one of these triggering events could take place "for purposes of this section" (i.e. for purposes of applications for cancellation of removal under INA Section 240A) in a proceeding, like the Villarreals', which is initiated by an Order to Show Cause, is in a case where IIRIRA Section 309(c)(2) is invoked. The plain language of Section 240A(d)(1) "For purposes of this section" indicates that this statute applies only to cases where there are applications for relief under INA Section 240A, namely cancellation of removal. One can

---

[2] In those proceedings where an OSC was issued but no evidentiary hearing was commenced as of April 1, 1997, IIRIRA Section 309(c)(2) permits the Attorney General to elect to proceed under the INA as amended by IIRIRA, as if the proceedings were initiated by a Notice to Appear.

only apply for such relief in removal proceedings, or in proceedings where the removal regime applies. Even taking into consideration cases covered by the transition rule, IIRIRA Section 309(c)(5)(A) and INA Section 240A(d)(1) would only apply to cases where an alien was served with an order to show cause (including pursuant to former Section 242B(a)(1)), but where the alien is applying for relief under INA Section 240A. Such an occurrence is possible only when the Attorney General has invoked IIRIRA Section 309(c)(2) in a case initiated by an Order to Show Cause and elects to proceed under the new sections of law created by IIRIRA. An individual in such proceedings would then be eligible to apply for cancellation of removal, rather than suspension of deportation, and thus Section 240A would apply. INA Section 240A does not apply in any other cases initiated by an Order to Show Cause as such persons are not eligible to apply for Cancellation of Removal.

Alternatively, if the phrase "[f]or purposes of this section" is not interpreted to refer only to applications for relief under that section, namely INA Section 240A, then IIRIRA Section 309(c)(5)(A) would apply to some applications for suspension of deportation initiated by orders to show cause. Again, under the plain language of INA Section 240A(d), however, the effect of that section on suspension applicants is to cause the period of continuous presence to end *only* when the alien commits an offense enumerated in that section that renders him or her inadmissible or removable or if the alien has certain absences.

Therefore, IIRIRA Section 309(c)(5) can apply to cases initiated by Orders to Show Cause in the above two ways.

However, the service of an Order to Show Cause will *not* terminate the period of continuous physical presence (with the exception of those cases in which IIRIRA Section 309(c)(2) is invoked) because service of a charging document can only cut off continuous physical presence when the charging document is a "notice to appear under section 239(a)". INA Section 240A(d).

In *Ram*, the Ninth Circuit Court of Appeals recognized the possible validity in the above interpretation of the statute. The Ninth Circuit found that "the statute's plain language is not free from ambiguity." *Ram*, 243 F.3d at 515. Further, the Ninth Circuit Court of Appeals specifically found that

> the "for purposes of this section" language in the stop-time rule does not, as Petitioners suggest, *necessarily* limit the scope of IIRIRA Section 309(c)(5)(A) to removal proceedings. *Ram*, 243 F.3d at 515 (emphasis added).

The word "necessarily" indicates that there is a possibility that the Petitioners' interpretation is the correct interpretation. In other words, IIRIRA Section 309(c)(5) and specifically the language regarding OSCs can sustain more than one interpretation. Therefore, the language of the statute does not have the clarity and "unambiguous direction" as required by the standards articulated in *St. Cyr*.

The Ninth Circuit Court of Appeals attempted to resolve this ambiguity by looking to legislative history. This reasoning is faulty. The legislative history indicates that Congress was indeed aware of the ambiguities present in the stop-time rule. In fact, in approving the

changes made by NACARA, Congress was clearly aware of the dispute over the interpretation of former Section 309(c)(5). *See Matter of N-J-B-*, Int. Dec. 3309 (BIA 1997). Therefore, it seems only logical that had Congress wished to make Section 309(c)(5) applicable to suspension of deportation cases, it would have indicated so in the statute without any ambiguities.

In fact, had Congress intended for the initiation of deportation proceedings to terminate an alien's continuous presence *in every case* (including suspension cases), it would have chosen to include such language in Section 240A(d) or at least, would have done so through IIRIRA's transitional section 309(c)(5) or when it enacted NACARA and referenced that section on several occasions. Congress had several separate opportunities to include such language in the statute. Given the presumption that Congress acts intentionally when it "includes particular language in one section of a statute but omits it in another," the fact that Congress did not use unambiguous language in IIRIRA Section 309(c)(5) is a strong indication that it did not intend a previously issued OSC under the suspension of deportation laws to be treated as a Notice to appear under Section 239(a).

Removal proceedings under IIRIRA Section 309(c)(2) were never initiated against the Villarreals. The Villarreals have never committed any offense in the United States. Nor have they had any absences at all since their lawful entry. Therefore, applying the "stop-time rule" to their case does not comport with the plain language of the statute.

2.

DEPRIVING ALIENS OF SUSPENSION RELIEF PRODUCES AN IMPERMISSIBLY RETROACTIVE EFFECT FOR ALIENS, SUCH AS THE VILLARREALS, WHO WERE STATUTORILY ELIGIBLE FOR SUSPENSION RELIEF PRIOR TO APRIL 1, 1997 BUT DID NOT HAVE THE MERITS OF THEIR CASE HEARD PRIOR TO THAT DATE.

In *Ram v. INS*, the Ninth Circuit Court of Appeals erred in finding that Congress clearly demonstrated its intent to have IIRIRA Section 309(c)(5) apply retroactively to cases such as the Villarreals'. The Ninth Circuit further erred in stopping its analysis on impermissible retroactivity at that point and not applying the retroactivity analysis as laid out in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994) to the present issue.

This Court has recently found that

> "The inquiry into whether a statute operates retroactively demands a commonsense, functional judgment about 'whether the new provision attaches new legal consequences to events completed before its enactment.' " [Citation omitted]. A statute has retroactive effect when it "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past." [Citations omitted.] As we have repeatedly counseled, the judgment whether a particular statute acts retroactively "should be informed and guided by 'familiar considerations of fair notice, reasonable reliance, and settled expectations.' " *INS v. St. Cyr*, 121 S.Ct. 2271, 2290-2291 (2001).

In the present case, retroactive application of the statute does indeed take away vested rights. On March 28, 1996, the Villarreals admitted the factual allegations in the Order to Show Cause and conceded deportability in reliance on the fact that they were statutorily eligible for relief from deportation.

They remained statutorily eligible for suspension relief from October 26, 1996 until April 1, 1997. During that time, they could have been granted suspension of deportation, and indeed, the Immigration Judge stated that their applications were favorable. See Immigration Judge's decision, App. 3-5. The Villarreals conceded deportability based on their reliance on the fact that they could apply for relief from deportation.

The retroactive application of the stop-time rule to the Villarreals' case took away statutory eligibility for the relief from deportation upon which the Villarreals had relied in conceding deportability. Suddenly, they were no longer eligible to apply for any form of relief from deportation.

As this Court has recently found, "There is a clear difference, for the purposes of retroactive analysis, between facing possible deportation and facing certain deportation." *INS v. St. Cyr*, 121 S.Ct. 2271, 2293 (2001), citing *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 949 (1997).

The application of IIRIRA Section 309(c)(5) to the present case would attach new legal consequences to actions already completed and would therefore have an impermissibly retroactive effect.

II.

THE NINTH CIRCUIT COURT OF APPEALS CASE-LAW HAS CREATED A SITUATION WHICH VIOLATES THE EQUAL PROTECTION RIGHTS OF APPLICANTS SUCH AS THE VILLARREALS WHO WERE IN PROCEEDINGS AND STATUTORILY ELIGIBLE FOR SUSPENSION OF DEPORTATION PRIOR TO APRIL 1, 1997 BUT WERE UNABLE TO HAVE THEIR CASES HEARD UNTIL AFTER IIRIRA BECAME EFFECTIVE.

The Supreme Court has repeatedly stressed the paramount authority of the executive and legislative branches of our national government with respect to immigration matters. *See, e.g., Fiallo v. Bell*, 430 U.S. 787 (1977); *Mathews v. Diaz*, 426 U.S. 67, 81-82 (1976); *Kleindienst v. Mandel*, 408 U.S. 753, 765-767 (1972). Congress' exercise of such power, if predicated on a rational basis, may distinguish between classes of aliens and confer benefits on one or more classes that are not available to others. *See Mathews*, 426 U.S. at 81-84. However, classifications which distinguish among similarly situated groups of aliens must be denied if the classification is not supported by a facially legitimate and bona fide reason. *See Fiallo*, 430 U.S. at 794; *Kleindienst*, 408 U.S. at 770; *Ablang v. Reno*, 52 F.3d 801, 804 (9th Cir. 1995), *cert. denied*, 116 S.Ct. 701 (1996). The Supreme Court has specifically held that different classifications of persons "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons in similar circumstances shall be treated alike." *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

The Ninth Circuit Court of Appeals has found that "the stop-time rule" applies to suspension of deportation cases heard by an IJ or on appeal after IIRIRA took effect. *Ram v. INS*, 243 F.3d at 514. The Ninth Circuit Court of Appeals also held that IIRIRA Section 309(c)(5) does not apply to suspension hearings held before April 1, 1997, the effective date of IIRIRA. *Guadalupe-Cruz v. INS*, 240 F.3d 1209 (9th Cir., 2001).

Section 309(c)(5) as interpreted by *Ram* and *Guadalupe-Cruz* creates two groups of similarly situated individuals who are treated differently. Those applicants who had accumulated seven years' continuous presence before April 1, 1997 and had their cases heard prior to the enactment of IIRIRA remained statutorily eligible for suspension despite the fact that they had not accumulated seven years prior to the service of the Order to Show Cause. Those applicants in an identical situation except for the fact that they were not fortunate enough to have their cases heard prior to April 1, 1997 are statutorily ineligible for suspension relief.

The results of this seemingly clear-cut law are unjust and random for applicants in the Villarreals' situation for the following reasons. The law regarding the application of the stop-time rule remained unsettled for a period of time before April 1, 1997. Immigration Judges who wanted to grant a case but believed they were barred by the stop-time rule often continued the case to see how the law would be decided rather than flat out deny the case.

To make matters worse, on February 11, 1997, Judge Creppy issued a memo to all immigration judges prohibiting the granting of suspension cases because IIRIRA

Section 309(c)(7) had imposed a cap of 4000 suspension grants effective April 1, 1997. Subsequent amendments to the statute demonstrate that the cap did not in fact apply to cases prior to April 1, 1997. *Barahona-Gomez v. Reno*, 167 F.3d 1228 (9th Cir. 1999). Despite the lack of any statutory authority, this memo in effect prevented the Villarreals and applicants in a similar situation from having their cases heard while they were still statutorily eligible for relief.

During the months preceding April 1, 1997, because of the Creppy memo and uncertainty as to how the stop-time rule would be applied, Immigration Judges were not allowed to grant suspension cases that could potentially be barred by Section 309(c)(5). Therefore, during that period, if an Immigration Judge wanted to grant a suspension case that would be affected by Section 309(c)(5), he or she would have no choice but to continue the case in the hopes that the law would allow them to grant it at a later date. During that period, they could only adjudicate those cases they were willing to deny.

Ironically, the *Ram* and *Guadalupe-Cruz* holdings create a situation in which applicants whose cases were continued past April 1, 1997 are no longer statutorily eligible for suspension relief while those applicants whose cases were denied prior to April 1, 1997 are now statutorily eligible for relief. This result is random at best. It is peculiar and unjust given the circumstances surrounding the stop-time rule in the months preceding its effective date.

Furthermore, there is no rational basis for this distinction. The *Ram* Court found that "Congress . . . enacted

the stop-time rule set forth in IIRIRA . . . motivated by the belief that 'suspension of deportation is often abused by aliens seeking to delay proceedings until seven years have accrued . . . even after they have been placed in deportation proceedings.' " *Ram v. INS*, 243 F.3d at 518, citing H.R. Rep. No. 104-469(I) at 390 (1996).

If that is indeed the purpose of the statute, it is not logical to apply the stop-time rule to the present case. The Villarreals did not abuse suspension of deportation relief. *They* did not delay proceedings. Rather, they were the victims of delays beyond their control. To penalize them for these delays does not satisfy any stated purpose of the statute.

In the present case, the Villarreals were already in deportation proceedings as of April 1, 1997, the effective date of IIRIRA. The Villarreals were put into deportation proceedings on September 7, 1995, well before the stop-time rule went into effect. As of October 26, 1996, they were in deportation proceedings *and* had accumulated seven years' continuous presence. IIRIRA Section 309(c)(5) went into effect on April 1, 1997. Therefore, there was a large window of time in which the Villarreals were in deportation proceedings, had accumulated the requisite continuous presence, and the stop-time rule was not yet in effect. During that time, they were statutorily eligible for suspension of deportation but were not able to have the merits of their cases adjudicated.

The Villarreals had a hearing in immigration court scheduled for October 28, 1996. At that point, they were statutorily eligible for suspension. They could have had their hearing at any time prior to April 1, 1997.

On November 27, 1996, they submitted their suspension applications with supporting documents. They still remained statutorily eligible for suspension until April 1, 1997 when IIRIRA Section 309(c)(5) went into effect, changing the law on continuous presence.

The Immigration Judge could have heard their case at this date or any other date before April 1, 1997. The Immigration Judge's decision to set the case over to a date after the law changed was either an arbitrary, administrative decision or a decision motivated by the fact that had she wanted to grant the Villarreals' case prior to April 1, 1997, she would have been prevented from so doing by the Creppy memo.[3] In either scenario, the Villarreals had absolutely no control over this decision, and should not be penalized for it.

The Villarreals were statutorily eligible for suspension relief prior to April 1, 1997. For reasons beyond their control, their cases were continued to a time when they were no longer statutorily eligible for such relief. The Ninth Circuit Court of Appeals' failure to address the issue of applicants in the Villarreals' situation is a glaring omission. In fact, it is random and patently unfair to apply the stop-time rule in such cases.

---

[3] In the present case, it appears that the Immigration Judge did want to grant the applications. In her Oral Decision, the Immigration Judge stated: "These are very favorable applications. I'm very impressed with the family, the written form already and I have no doubts that they could be consistent orally, how be it they choose not to make an advisory decision. I have no choice today, however, because the law is very severe and is still being interpreted in this matter." See Oral Decision and Order, App. 3-5.

For the above reasons, application of the stop-time rule to the present case would violate the Villarreals' equal protection rights.

CONCLUSION

Based on the foregoing, the Villarreals respectfully request that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

ARIELLE BASES, ESQ.
Counsel of Record
LAW OFFICE OF ARIELLE BASES
16633 Ventura Boulevard, Suite 1200
Encino, CA 91436
(818) 905-1144

ENRIQUE AREVALO, ESQ.
LAW OFFICE OF ENRIQUE AREVALO
505 Mission St.
South Pasadena, CA 91030
(626) 799-6585

Attorneys for Petitioners

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHELO HENRY VILLARREAL-ALARCON; ROXANA C. VILLARREAL; ITALO H. VILLARREAL-JURGENS; GINO A. VILLARREAL-JURGENS, Petitioners, v. IMMIGRATION AND NATURALIZATION SERVICE, Respondent,	No. 00-70455 Agency Nos. A70-960-320 A70-960-321 A70-960-322 A70-960-323 MEMORANDUM[1] (Filed Mar. 28, 2001)

On Petition for Review of an Order of the board of Immigration Appeals

Submitted March 12, 2001[2]

Before: WALLACE, SILVERMAN, and W. FLETCHER, Circuit Judges.

---

[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

[2] The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Chelo Henry Villarreal-Alarcon, Roxana C. Villarreal, Italo H. Villarreal-Jurgens, and Gino A. Villarreal-Jurgens petition for review of their final order of deportation entered by the Board of Immigration Appeals ("BIA") on March 31, 2000. Petitioners were served with orders to show cause on December 5, 1995, approximately six years and two months after they entered the United States. At a hearing on December 1, 1997, the immigration judge denied their applications for suspension of deportation because they had failed to meet the continuous physical presence requirement before being served with the orders to show cause and thus were statutorily ineligible for suspension. On appeal, the BIA affirmed.

Petitioners contend that they were eligible for suspension of deportation and challenge the BIA's decision that the "stop-time rule," a new continuous physical presence requirement set forth in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 110 Stat. 3009-625, bars such relief in their case. Petitioner's arguments challenging the application of the stop-time rule are foreclosed by our recent decision in *Ram v. INS*, No. 99-70918, 2001 WL 173309 (9th Cir. Feb. 8, 2001). We do not consider their eligibility, if any, for relief under the class action pending in the district court in accordance with *Barahona-Gomez v. Reno*, 167 F.3d 1228 (9th Cir. 1999), *supplemental opinion*, 236 F.3d 1115 (9th Cir. 2001). Our resolution of this case does not affect any interim or permanent relief awarded to members of the class certified in *Barahona-Gomez*.

PETITION FOR REVIEW DENIED.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Los Angeles, California

File No.: A 70-960 320
A 70 960 321
A 70 960 322
A 70 960 323

December 1, 1997

In the Matters of
ACHELO HENRY VILLARREAL ALARCON
and
ROXANA C. VILLARREAL
and
ITALO VILLARREAL
and
GINO VILLARREAL
Respondents

IN DEPORTATION PROCEEDINGS

CHARGE: Section 241(a)(1)(B) of the I&N Act Overstay.

APPLICATIONS: Initially Asylum then Withdrawn; Suspension of Deportation; Voluntary Departure

ON BEHALF OF RESPONDENTS:	ON BEHALF OF SERVICE:
Enrique Arevalo, Esquire 505 Mission Street South Pasadena, CA 91030	Carey Harlan, Esquire Assistant District Counsel U.S. INS Los Angeles, CA 90012

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondents' hearing consists of a family unit parents and two offsprings. They were brought under deportation proceedings by an Order to Show Cause, issued and served September 7, 1995. Through Counsel allegations of fact were admitted, deportability conceded. Deportability is not an issue in this case. Should be noted that the plea was taken March of 1996 and only because of the calendar was it not scheduled till October 28, 1996. This is an important distinction because I've poured so much work into this Los Angeles District case perhaps for an entirely different decision had it been scheduled before September 30, 1996. There was no continuance by either side nor by the Court's on availability. Since October 28, 1996, however, four continuances have resulted. However, today it has to be decided since it's been on the docket three other times. I am reluctant to proceed because of the 309(c)(5) issue.

These are very favorable applications. I'm very impressed with the family, the written form already and I have no doubts that they could be consistent orally, how be it they choose not to make an advisory decision. I have no choice today, however, because the law is very severe and is still being interpreted in that matter. Because the respondents' lack the seven years of continuous physical

presence between the issuance of the Order to Show Cause and service and the entry, I must today, December 1st, deny the applications for Suspension of Deportation. This is solely done under the 309(c)(5) issue and certainly any change will immediately be considered and scheduled even on an administrative time, so I can complete my determination or deem relief available in the future which that, in fact, would happen.

It is now ordered that the application for Suspension of Deportation be denied. However, I will grant the privilege of Voluntary Departure to leave on or before October 1, 1998 or any extension beyond first date that may be granted by District Director as far as the order if they choose not to depart they will be deported to their country of origin, Peru.

/s/ [Illegible]
Ingrid K. Hrycenko
Immigration Judge

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
LOS ANGELES, CA

In the Matter of:
VILLARREAL JURGENS, GINO A

File: A 70-960-323
in DEPORTATION Proceedings

Order of the Immigration Judge

This is a summary of the Oral Decision and Order entered on Dec 1, 1997. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed, the Oral Decision and Order will be transcribed and will become the official opinion in this case.

_ The Respondent's application for Voluntary Departure was denied and he/she was ordered deported to

or

✓ Respondent's application for Voluntary Departure was granted to on or before 10/1/98 with an alternate Order of Deportation to Peru

✓ Respondent's application for ASYLUM was Granted / Denied. Withdrawn WITHHOLDING OF DEPORTATION was Granted / Denied.

_ A waiver under Sec. 212 (c) was Granted / Denied.

_ The Respondent was Granted / Denied adjustment of status.

✓ The Respondent's application for suspension of deportation is hereby Granted / Denied.

_ The proceedings were terminated.

_ The Respondent was ordered deported to

✓ Appeal reserved / waived by Service / Respondent Notice of Appeal to be filed no later than 1/1/98.

✓ Other 309(c)(5) issue denied only

Date: Dec. 1, 1997

Ingrid K. Hrycenko
Ingrid K. Hrycenko
Immigration Judge

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
LOS ANGELES, CA

In the Matter of:
VILLARREAL JURGENS, ITALO R

File: A 70-960-322
in DEPORTATION
Proceedings

Order of the
Immigration Judge

This is a summary of the Oral Decision and Order entered on Dec 1, 1997. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed, the Oral Decision and Order will be transcribed and will become the official opinion in this case.

_ The Respondent's application for Voluntary Departure was denied and he/she was ordered deported to

or

✓ Respondent's application for Voluntary Departure was granted to on or before 10/1/98 with an alternate Order of Deportation to Peru

✓ Respondent's application for ASYLUM was Granted / Denied. Withdrawn WITHHOLDING OF DEPORTATION was Granted / Denied.

_ A waiver under Sec. 212 (c) was Granted / Denied.

_ The Respondent was Granted / Denied adjustment of status.

✓ The Respondent's application for suspension of deportation is hereby Granted / Denied.

_ The proceedings were terminated.

_ The Respondent was ordered deported to

✓ Appeal reserved / waived by Service / Respondent Notice of Appeal to be filed no later than 1/1/98.

_ Other _____

_____

Date: Dec. 1, 1997

Ingrid K. Hrycenko
Ingrid K. Hrycenko
Immigration Judge

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
LOS ANGELES, CA

In the Matter of:
VILLARREAL, ROXANNA C

File: A 70-960-320
In DEPORTATION Proceedings

Order of the Immigration Judge

This is a summary of the Oral Decision and Order entered on Dec. 1, 1997. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed, the Oral Decision and Order will be transcribed and will become the official opinion in this case.

-- The Respondent's application for Voluntary Departure was denied and he/she was ordered deported to

or

✓ Respondent's application for Voluntary Departure was granted to on or before 10/1/98 with an alternate Order of Deportation to Peru

✓ Respondent's application for ASYLUM was Granted / Denied. Withdrawn WITHHOLDING OF DEPORTATION was Granted / Denied.

_ A waiver under Sec. 212 (c) was Granted / Denied.

_ The Respondent was Granted / Denied adjustment of status.

✓ The Respondent's application for suspension of deportation is hereby Granted / Denied.

_ The proceedings were terminated.

_ The Respondent was ordered deported to

✓ Appeal reserved / waived by Service / Respondent Notice of Appeal to be filed no later than 1/1/98.

✓ Other 309(c)(5) issue denied

Date: Dec. 1, 1997

Ingrid K. Hrycenko
Ingrid K. Hrycenko
Immigration Judge

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
LOS ANGELES, CA

In the Matter of:
VILLARREAL ALARCON,
CHELO HENRY

File: A 70-960-321
In DEPORTATION
Proceedings

Order of the
Immigration Judge

This is a summary of the Oral Decision and Order entered on Dec 1, 1997. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed, the Oral Decision and Order will be transcribed and will become the official opinion in this case.

_ The Respondent's application for Voluntary Departure was denied and he/she was ordered deported to

or

✓ Respondent's application for Voluntary Departure was granted to on or before 10/1/98 with an alternate Order of Deportation to Peru

✓ Respondent's application for ASYLUM was Granted / Denied. Withdrawn WITHHOLDING OF DEPORTATION was Granted / Denied.

_ A waiver under Sec. 212 (c) was Granted / Denied.

_ The Respondent was Granted / Denied adjustment of status.

✓ The Respondent's application for suspension of deportation is hereby Granted / Denied.

_ The proceedings were terminated.

_ The Respondent was ordered deported to

✓ Appeal reserved / waived by Service / Respondent Notice of Appeal to be filed no later than _____.

✓ Other 309(c)(5) denial only

Date: Dec. 1, 1997

Ingrid K. Hrycenko
Ingrid K. Hrycenko
Immigration Judge

ALIEN NUMBER: 70-960-321 NAME: VILLARREAL ALARCON, CHELO HENRY

LIMITATION ON DISCRETIONARY RELIEF FOR FAILURE TO APPEAR

( ) 1. You have been scheduled for a deportation hearing, at the time and place set forth on the attached sheet. Failure to appear for this hearing other than because of exceptional circumstances beyond you control** will result in your being found ineligible for certain forms of relief under the Immigration and Nationality Act (see Section A. below) for a period of five (5) years after the date of entry of the final order of deportation.

( ) 2. You have been scheduled for an asylum hearing, at the time and place set forth on the attached notice. Failure to appear for this hearing other than because of exceptional circumstances beyond your control** will result in your being

found ineligible for certain forms of relief under the Immigration and Nationality Act (see Section A. below) for a period of five (5) years from the date of your scheduled hearing.

(X) 3. You have been granted voluntary departure from the United States pursuant to section 244(e)(1) of the Immigration and Nationality Act. Remaining in the United States beyond the authorized date other than because of exceptional circumstances beyond your control** will result in your being ineligible for certain forms of relief under the Immigration and Nationality Act (see Section A. below) for five (5) years from the date of scheduled departure or the date of unlawful reentry, respectively.

( ) 4. A final order of deportation has been entered against you. If you fail to appear for deportation at the time and place ordered by the INS, other than because of exceptional circumstances beyond your control** you will not be eligible for certain forms of relief under the Immigration and Nationality Act (see Section A. below) for five (5) years after the date you are scheduled to appear.

** The term "Exceptional circumstances" refers to exceptional circumstances such as serious illness of the alien or death of an immediate relative of the alien, but not including less compelling circumstances.

A. THE FORMS OF RELIEF FROM DEPORTATION FOR WHICH YOU WILL BECOME INELIGIBLE ARE:

1) Voluntary departure as provided for in section 242(b) of the Immigration and Nationality Act;

2) Suspension of deportation or voluntary departure as provided for in section 244(e) of the Immigration and Nationality act; and

3) Adjustment of status or change of status as provided for in section 245, 248 or 249 of the Immigration and Nationality Act.

This written notice was provided to the alien in English and in Spanish. Oral notice of the contents of this notice was given to the alien in his/her native language, or in a language he/she understands.

Date: Dec. 1, 1997

Immigration Judge: /s/ [Illegible]
or
Clerk of the Court: _____ WZ

[SEAL] **U.S. Department of Justice**

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5201 Leesburg Pike, Suite 1300
Falls Church, Virginia 22041

Arevalo, Enrique
505 Mission Street,
South Pasadena, CA 91030

Office of the
District Counsel/LO
606 S. Olive Street,
8th Floor
Los Angeles, CA 90014

Name: VILLARREAL ALARCON, CHELO HENRY

A70-960-321

Date of this notice: 03/31/2000

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Very Truly Yours,

/s/ Paul W. Schmidt
Paul W. Schmidt
Chairman

Enclosure

Board's order also includes A70 960 320/322/323

Panel Members:
DUNNE, MARY M.
GUENDELSBERGER, JOHN
HOLMES, DAVID B.

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

Files: A70 960 321 – Los Angeles Date: MAR 31 2000
A70 960 320
A70 960 322
A70 960 323

In re: CHELO HENRY VILLARREAL-ALARCON
ROXANA C. VILLARREAL
ITALO H. VILLARREAL-JURGENS
GINO A. VILLARREAL-JURGENS

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS: John Ayala, Esquire

ON BEHALF OF SERVICE: Kerri A. Harlin
Assistant District Counsel

CHARGE:

Order: Sec. 241(a)(1)(B), I&N Act [8 U.S.C. § 1251(a)(1)(B)] –
In United States in violation of law

APPLICATION: Suspension of deportation

ORDER:

PER CURIAM. The respondents have appealed only that portion of the Immigration Judge's decision denying their applications for suspension of deportation under

section 244(a) of the Immigration and Nationality Act. The appeal is dismissed. The request for oral argument before the Board is denied. 8 C.F.R. § 3.1(e).

On appeal, the respondents argue that the Immigration Judge erred in finding them statutorily ineligible for suspension of deportation under section 244(a) of the Act. We find no error. For purposes of determining eligibility for suspension of deportation, the period of continuous physical presence ends at the service of the Order to Show Cause and Notice of Hearing (Form I-221) on the alien, irrespective of the date that it was issued. *See Matter of Nolasco,* Interim Decision 3385 (BIA 1999).

In the present case, the record reflects that the respondents entered the United States on or about October 26, 1989. *See* Exh. 1. The Orders to Show Cause were served on the respondents on December 12, 1995, before they had acquired 7 years of continuous physical presence in this country. *Id.* The respondents are thus unable to satisfy the statutory physical presence requirement now in effect and accordingly have failed to meet their burden of establishing prima facie eligibility for suspension of deportation. Because we find the lack of requisite physical presence dispositive in terms of the respondents' eligibility for suspension of deportation, we need not address the other arguments raised by the parties.

The respondents also raise arguments on appeal regarding the constitutionality of the changes in the law. We cannot rule on the constitutionality of laws enacted by Congress. *See, e.g., Matter of Fuentes-Campos,* 21 I&N Dec. 905 (BIA 1997); *Matter of C-,* 20 I&N Dec. 529 (BIA 1992).

Accordingly, the appeal is dismissed.

FURTHER ORDER: Pursuant to the Immigration Judge's order and in accordance with our decision in *Matter of Chouliaris*, 16 I&N Dec. 168 (BIA 1977), the respondents are permitted to depart from the United States voluntarily within 30 days from the date of this order or any extension beyond that time as may be granted by the district director; and in the event of failure so to depart, the respondents shall be deported as provided in the Immigration Judge's order.

/s/ John Guendelsberger
FOR THE BOARD

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHELO HENRY VILLARREAL-ALARCON; ROXANA C. VILLARREAL; ITALO H. VILLARREAL-JURGENS; GINO A. VILLARREAL-JURGENS, Petitioners, v. IMMIGRATION AND NATURALIZATION SERVICE, Respondent.	No. 00-70455 INS Nos. A70-960-321 A70-960-320 A70-960-322 A70-960-323 ORDER FILED JUN 8 2001

Before: WALLACE, SILVERMAN and W. FLETCHER, Circuit Judges

Petitioners' petition for penal rehearing is denied.

Supreme Court, U.S.
FILED
NOV 8 2001

No. 01-403

In the Supreme Court of the United States

CHELO HENRY VILLARREAL-ALARCON, ET AL.,
PETITIONERS

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

ROBERT D. MCCALLUM, JR.
Assistant Attorney General

DONALD E. KEENER
FRANCIS W. FRASER
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the court of appeals correctly concluded that, under Section 309(c)(5) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-627, as amended by Section 203(a)(1) of the Nicaraguan Adjustment and Central American Relief Act (NACARA), Pub. L. No. 105-100, Tit. II, 111 Stat. 2196, petitioners are statutorily ineligible for suspension of deportation under former 8 U.S.C. 1254(a) (1994) because they had not accrued seven years of continuous physical presence in the United States when their deportation proceedings were commenced by service of an Order to Show Cause.

2. Whether petitioners' due process and equal protection rights were violated by the application to this case of Section 309(c)(5) of IIRIRA and Section 203(a)(1) of NACARA, which were enacted after they were placed in deportation proceedings, and which effectively terminated their statutory eligibility for suspension of deportation.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	10
Conclusion	19

TABLE OF AUTHORITIES

Cases:

Afolayan v. *INS*, 219 F.3d 784 (8th Cir. 2000)	12
Angel-Ramos v. *Reno*, 227 F.3d 942 (7th Cir. 2000)	12
Appiah v. *INS*, 202 F.3d 704 (4th Cir.), cert. denied, 531 U.S. 857 (2000)	12
Gonzalez-Torres v. *INS*, 213 F.3d 899 (5th Cir. 2000)	12
Guadalupe-Cruz v. *INS*, 240 F.3d 1209 (9th Cir. 2001)	12, 17
Heller v. *Doe*, 509 U.S. 312 (1993)	19
INS v. *St. Cyr*, 121 S. Ct. 2271 (2001)	16, 17
LaGuerre v. *Reno*, 528 U.S. 1153 (2000)	12
Landgraf v. *USI Film Prods.*, 511 U.S. 244 (1994)	10, 15
Nolasco- Tofino, In re, Interim Dec. 3385 (B.I.A. Apr. 15, 1999)	5, 8, 14
Otarola v. *INS*, No. 99-71405, 2001 WL 1242254 (9th Cir. Oct. 18, 2001)	12, 17
Ram v. *INS*, 243 F.3d 510 (9th Cir. 2001)	8, 9, 10, 15, 18
Reno v. *Goncalves*, 526 U.S. 1004 (1999)	12
Reno v. *Navas*, 526 U.S. 1004 (1999)	12
Rivera-Jimenez v. *INS*, 214 F.3d 1213 (10th Cir. 2000)	12
Tefel v. *Reno*, 180 F.3d 1286 (11th Cir. 1999), cert. denied, 530 U.S. 1228 (2000)	11, 12

Cases—Continued: Page

United States R.R. Ret. Bd. v. *Fritz*, 449 U.S. 166 (1980) 18
Vargas-Gonzalez v. *INS*, 647 F.2d 457 (5th Cir. 1981) 2

Statutes and regulation:

Haitian Refugee Immigration Fairness Act of 1998, Pub. L. No. 104-277, Div. A, § 101(h), Tit. IX, § 902(b), 112 Stat. 2681-538 6
Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 *et seq.* 2
§ 309(c)(2), 110 Stat. 3009-626 ..... 9, 13
§ 309(c)(5), 110 Stat. 3009-627 ..... 4, 5, 9, 10, 11, 12, 13, 14, 15
§ 309(c)(5)(A) 9, 10, 14, 17
§ 309(c)(5)(B) 14
§ 309(c)(5)(C) 14
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.* 2
8 U.S.C. 1182(c) (1994) 16
8 U.S.C. 1229(a) 3
8 U.S.C. 1229b 3, 11, 14
8 U.S.C. 1229b(a) 3
8 U.S.C. 1229b(b) 3
8 U.S.C. 1229b(d) 4
8 U.S.C. 1229b(d)(1) 3, 9, 10, 12
8 U.S.C. 1251(a)(1)(B) (1994) 6
8 U.S.C. 1254(a) (1994) 2, 11
8 U.S.C. 1254(a)(1) (1994) 2
Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, Tit. II, 111 Stat. 2193 *et seq.* 5
§ 202(b)(1), 111 Stat. 2194 6
§ 203(a), 111 Stat. 2196 ..... 13, 14, 15, 17
§ 203(a)(1), 111 Stat. 2196 5

Statutes and regulation—Continued:

	Page
§ 203(a)(2), 111 Stat. 2198	9
§ 203(f), 111 Stat. 2200	5, 13
8 C.F.R. 3.1(h)(1)(i)	5

In the Supreme Court of the United States

No. 01-403

CHELO HENRY VILLARREAL-ALARCON, ET AL.,
PETITIONERS

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals denying the petition for review (Pet. App. 1-2) is unreported. The decisions of the immigration judge (Pet. App. 3-5) and the Board of Immigration Appeals (Pet. App. 14-17) are also unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 28, 2001. A petition for rehearing was denied on June 8, 2001. Pet. App. 18. The petition for a writ of certiorari was filed on September 5, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Before the amendments to the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, enacted by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546 *et seq.*, an alien who was subject to deportation could apply for suspension of deportation and adjustment of status to that of a lawful permanent resident (LPR). 8 U.S.C. 1254(a) (1994).[1] Such relief was available in the discretion of the Attorney General. To qualify for consideration, the alien was required to demonstrate, *inter alia*, that he had been "physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application [for relief]." 8 U.S.C. 1254(a)(1) (1994).[2] The time that an alien spent in deportation proceedings before issuance of a final order of deportation was counted towards the requirement of seven years of continuous physical presence in the United States. See, *e.g.*, *Vargas-Gonzalez* v. *INS*, 647 F.2d 457, 458 (5th Cir. 1981).

On September 30, 1996, Congress enacted IIRIRA. That statute abolished the old distinction between deportation and exclusion proceedings, repealed the provision for suspension of deportation in former 8 U.S.C. 1254(a) (1994), instituted a new form of proceeding

---

[1] Unless otherwise indicated, references in this brief to Title 8 of the United States Code are to the current (2000) edition. References to the 1994 edition are identified as such.

[2] The alien was also required to demonstrate that he was of good moral character, and that his deportation would result in "extreme hardship" to himself or a spouse, parent, or child who was a citizen of the United States or an alien lawfully admitted for permanent residence. 8 U.S.C. 1254(a)(1) (1994).

known as "removal," and established a new form of discretionary relief from removal, known as "cancellation of removal." See 8 U.S.C. 1229(a), 1229b. Under the latter provision, the Attorney General may in his discretion cancel the removal of an alien if the alien demonstrates, among other things, that he has resided in the United States continuously for seven years (if the alien is an LPR) or has been continuously present in the United States for ten years (if the alien is not an LPR). 8 U.S.C. 1229b(a) and (b).

For purposes of eligibility for cancellation of removal, however, the required continuous residence or physical presence is "deemed to end * * * when the alien is served a notice to appear," 8 U.S.C. 1229b(d)(1), not when the alien makes his application for relief. The Notice to Appear is the document that commences removal proceedings under IIRIRA, and replaces the old Order to Show Cause (OSC), service of which commenced deportation proceedings under the INA before IIRIRA. See 8 U.S.C. 1229(a). Thus, IIRIRA instituted a new rule (known as the "stop-time" rule), under which the commencement of removal proceedings cuts off the time that is counted towards establishing an alien's eligibility for cancellation of removal, and the time that an alien spends in removal proceedings is not counted.

The new cancellation-of-removal provisions (including the ten-year eligibility requirement for aliens who are not LPRs) were for the most part not made applicable to aliens whose immigration proceedings were commenced prior to April 1, 1997, the general effective date of IIRIRA. IIRIRA did, however, contain a special "transitional rule with regard to suspension of deportation," which provided that the new stop-time rule was to apply to "notices to appear" issued before, on, or

after the date of enactment of IIRIRA, *i.e.*, September 30, 1996. Specifically, IIRIRA Section 309(c)(5) originally provided:

> TRANSITIONAL RULE WITH REGARD TO SUSPENSION OF DEPORTATION.—Paragraphs (1) and (2) of section 240A(d) of the Immigration and Nationality Act [8 U.S.C. 1229b(d)] (relating to continuous residence or physical presence) shall apply to notices to appear issued before, on, or after the date of the enactment of this Act.

110 Stat. 3009-627.

b. After enactment of IIRIRA, aliens in deportation proceedings argued that the new stop-time rule of IIRIRA did not apply to proceedings commenced before the full effective date of IIRIRA, April 1, 1997. That argument was based on the language in IIRIRA Section 309(c)(5) directing that the new stop-time rule be applied in cases in which a "notice to appear" had been issued. Under deportation proceedings initiated before IIRIRA's effective date, no document known as a "notice to appear" existed, and proceedings were commenced by service of an Order to Show Cause.

On February 20, 1997, the Board of Immigration Appeals (BIA) rejected that argument, and held that IIRIRA Section 309(c)(5) required that the new stop-time rule be applied to all pending and future deportation proceedings, including those commenced before IIRIRA was enacted. *In re N-J-B-*, Interim Dec. 3415 (B.I.A. Feb. 20, 1997). The BIA concluded (slip op. 8-12) that the term "notice to appear" in IIRIRA Section 309(c)(5) referred generically to a document initiating proceedings, and that, because Section 309(c)(5) expressly referred to such a document "issued before, on, or after" IIRIRA's enactment date, it necessarily

included an Order to Show Cause issued before that date. On July 10, 1997, the Attorney General, exercising her authority under 8 C.F.R. 3.1(h)(1)(i), vacated the BIA's decision in *N-J-B-* and certified that case to herself for her review and determination. See *In re N-J-B-*, Interim Dec. 3415, slip op. 39 (A.G. July 10, 1997).

c. On November 19, 1997, while *In re N-J-B-* was still pending before the Attorney General, Congress enacted the Nicaraguan Adjustment and Central American Relief Act (NACARA), Pub. L. No. 105-100, Tit. II, 111 Stat. 2193 *et seq.*. Section 203(a)(1) of NACARA amended IIRIRA Section 309(c)(5) to make clear that the stop-time rule of IIRIRA applies to deportation proceedings initiated before April 1, 1997, by service of an Order to Show Cause (rather than a Notice to Appear). NACARA Section 203(a)(1) amended IIRIRA Section 309(c)(5) to read in part as follows:

> (A) IN GENERAL.— * * * [P]aragraphs (1) and (2) of section 240A(d) of the Immigration and Nationality Act (relating to continuous residence or physical presence) shall apply to *orders to show cause* (including those referred to in section 242B(a)(1) of the Immigration and Nationality Act, as in effect before the title III-A effective date), issued before, on, or after the date of the enactment of this Act.

111 Stat. 2196 (emphasis added). Section 203(f) of NACARA also made that amendment effective as if included in the original enactment of IIRIRA. 111 Stat. 2200. In *In re Nolasco-Tofino*, Interim Dec. 3385 (B.I.A. Apr. 15, 1999), the BIA held that, under the NACARA amendment, the stop-time rule applies

generally to deportation proceedings initiated before IIRIRA's effective date (except in the cases of aliens who qualify for a statutory exception).[3]

2. Petitioners are natives and citizens of Peru who entered the United States on October 26, 1989, as non-immigrant visitors for business, authorized to remain until April 26, 1990. Certified Administrative Record (C.A.R.) 479. (Petitioners are a "family unit parents and two offspring[.]" C.A.R. 40.) Petitioners did not leave the country as required and were placed in deportation proceedings on September 7, 1995, when the INS filed OSCs with the Immigration Court. The OSCs charged petitioners with being subject to deportation under 8 U.S.C. 1251(a)(1)(B) (1994), as aliens who remained in the United States longer than authorized. C.A.R. 480-481. The OSCs were served on petitioners by certified mail on December 5, 1995, about six years

---

[3] NACARA created an exception to the new stop-time rule for certain qualifying aliens from El Salvador, Guatemala, and Eastern Europe. That exception allowed qualified nationals of those countries to apply for suspension of deportation or cancellation of removal without having their period of continuous physical presence stopped at the time that an Order to Show Cause was served on them. See NACARA § 203(a)(1), 111 Stat. 2196-2198. NACARA also provided certain Nicaraguan nationals with another, broader form of relief. NACARA § 202(b)(1) provided qualified Nicaraguans the opportunity to apply directly for adjustment of status to LPR, without the need also to apply for suspension of deportation (including the need to show that deportation would cause hardship). See NACARA § 202(b)(1), 111 Stat. 2194. A similar privilege was extended to certain Haitian nationals in the Haitian Refugee Immigration Fairness Act of 1998, Pub. L. No. 104-277, Div. A, § 101(h), Tit. IX, § 902(b), 112 Stat. 2681-538. Citizens of Peru were not granted special relief from the stop-time rule.

and two months after they had entered the United States. C.A.R. 483.

At a deportation hearing on March 28, 1996, petitioners admitted the allegations in the OSCs, conceded deportability, and applied for asylum, withholding of deportation, and voluntary departure in the alternative. C.A.R. 47. The immigration judge (IJ) advised petitioners' counsel, "[n]ow you obviously know there's an apparent relief, Mr. Vasquez, for the potential suspension," and counsel responded, "Yes, Your Honor." C.A.R. 48. The IJ then calendared the case for October 28, 1996, and instructed counsel that, to avoid a further continuance, the application for suspension of deportation had to be fully "processed and ready for submission" for a hearing on that date. C.A.R. 48. The IJ further informed the parties that the application for suspension of deportation could not be filed before October 26, 1996 (seven years after petitioners had entered the United States), when she anticipated that petitioners would become eligible for that relief. *Ibid.*

Because the IJ was unavailable for a hearing on October 28, 1996, the hearing was rescheduled for November 27, 1996. C.A.R. 51, 379-385. At the hearing on November 27, 1996, petitioners' counsel reiterated his clients' request for suspension of deportation. INS counsel argued that, in light of Congress's enactment of IIRIRA's stop-time rule on September 30, 1996, petitioners were no longer eligible for suspension, as they had not accrued the requisite seven years of continuous physical presence in the United States before they were served with the OSC commencing their deportation proceedings. C.A.R. 52. The IJ rescheduled the hearing for June 19, 1997, the earliest date on which she was available, and permitted the parties to file briefs addressing the eligibility issue. C.A.R. 54, 371-377.

The hearing was eventually rescheduled again for December 1, 1997. C.A.R. 57.

On December 1, 1997, the IJ determined that the stop-time rule enacted in IIRIRA rendered petitioners ineligible for suspension of deportation because they had not accrued seven years of continuous physical presence in the United States before being served with the OSCs commencing their deportation proceedings. C.A.R. 61-62. Petitioners were granted voluntary departure. C.A.R. 62.

3. The Board of Immigration Appeals (BIA) affirmed the IJ's determination that petitioners are ineligible for suspension of deportation under the stop-time rule. Following its earlier decision in *Nolasco-Tofino*, *supra*, the BIA explained that "the period of continuous physical presence ends at the service of the Order to Show Cause and Notice of Hearing * * * on the alien." Pet. App. 16. Applying that rule, the BIA concluded that petitioners had not accrued the requisite seven years before service of their OSCs. *Ibid.*

4. Petitioners filed a petition for review of the BIA's decision in the United States Court of Appeals for the Ninth Circuit. Petitioners contended that the BIA's determination of the temporal scope of the stop-time rule in *Nolasco-Tofino* was erroneous, and that the application of that rule to their cases violated due process and equal protection. The court denied the petition in an unpublished decision, relying on its earlier decision rejecting similar contentions in *Ram* v. *INS*, 243 F.3d 510 (9th Cir. 2001).

In *Ram*, the court of appeals held that an alien who had been placed in deportation proceedings by an OSC and who applied for suspension of deportation was covered by the new stop-time rule, as implemented by the special transitional rule in IIRIRA Section

309(c)(5)(A). The court rejected the argument that the transitional rule of IIRIRA Section 309(c)(5)(A) applied only "in one very limited circumstance: namely, where a transitional rule alien served with an *OSC* under pre-IIRIRA law is ultimately placed in *removal* proceedings [under authority of IIRIRA section 309(c)(2)] (after April 1, 1997), from which he or she seeks *cancellation of removal*." *Ram*, 243 F.3d at 514.[4] Instead, the court agreed with the BIA that IIRIRA Section 309(c)(5)(A) clearly provides that the stop-time rule applies to suspension of deportation cases "heard by an IJ or on appeal after IIRIRA took effect [on April 1, 1997]." *Ibid.*

Although the stop-time rule enacted in 8 U.S.C. 1229b(d)(1) refers expressly to "notices to appear" that commence post-IIRIRA removal proceedings, and not expressly to the OSCs that initiate pre-IIRIRA deportation proceedings, the court nonetheless concluded that that reference was sensible in light of the fact that the new stop-time rule was enacted as a permanent provision of the INA and as such refers to permanent procedures, whereas IIRIRA Section 309(c)(5)(A) is a transitional provision that governs only transitional procedures eventually made obsolete by the permanent provisions. *Ram*, 243 F.3d at 514. The court also concluded that, although the original statutory language was not entirely free from ambiguity on the point, any ambiguity was resolved by the statute's subsequent amendment by NACARA Section 203(a)(2), 111 Stat. 2198, which replaced the original reference to "notices

---

[4] IIRIRA Section 309(c)(2) granted the Attorney General the option to apply the new removal procedures established by IIRIRA in cases initiated before April 1, 1997. See 110 Stat. 3009-626.

to appear" with an express reference to OSCs. That change clarified that the new stop-time rule is to be applied, through application of the transitional rule, not only in removal proceedings but in all suspension cases heard on or after April 1, 1997. *Id.* at 515-516.

The court in *Ram* also rejected the argument that application of IIRIRA Section 309(c)(5) to aliens who were aliens placed in proceedings before IIRIRA's April 1, 1997, effective date was unconstitutionally retroactive. Applying the retroactivity analysis articulated by this Court in *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994), the court first concluded that Congress had "expressly delineated" the temporal reach of IIRIRA Section 309(c)(5)(A) when it expressly made that transition rule applicable to all OSCs "issued *before, on, or after* the date of enactment of [IIRIRA]." *Ram*, 243 F.3d at 516. The court then held that "Congress was entitled to change the standards for suspension of deportation," and that, "[w]here this change shows a clear intent to apply the new stop-time rule to [aliens], its application to bar the prospective relief of suspension of deportation does not offend due process." *Id.* at 517.

ARGUMENT

The court of appeals correctly rejected petitioners' challenge to the BIA's application of the stop-time rule in 8 U.S.C. 1229b(d)(1) to their case. The court and the BIA properly determined that the transitional rule in IIRIRA Section 309(c)(5) makes that stop-time rule applicable, at a minimum, to all applications for suspension of deportation that are adjudicated by an immigration judge on or after IIRIRA's general effective date of April 1, 1997. That conclusion does not conflict with any decision of this Court or any other court of

appeals. Petitioners' constitutional objection to the application of the stop-time rule to their case is without merit. This Court denied review of a petition raising similar contentions in *Tefel* v. *Reno*, 530 U.S. 1228 (2000), and there is no reason for a different result in this case. In addition, the issues presented by this case are of little continuing importance, for petitioners' challenges pertain to eligibility for a form of discretionary relief, suspension of deportation, that has been prospectively repealed. Further review is therefore not warranted.[5]

1. The court of appeals' decision is of little continuing importance. The temporal scope of the transitional rule in IIRIRA Section 309(c)(5) affects only aliens who sought to apply for suspension of deportation, pursuant to former 8 U.S.C. 1254(a) (1994), in deportation proceedings commenced under pre-IIRIRA law. For removal proceedings commenced on or after April 1, 1997, however, suspension of deportation has been repealed and replaced by a new form of relief known as "cancellation of removal," which is subject to different substantive terms of eligibility. See 8 U.S.C. 1229b. Thus, the claims in this case concern only deportation proceedings affected by IIRIRA's transitional rules, and do not implicate any removal proceedings under the permanent provisions of IIRIRA. Petitioners are members of a finite group of aliens who are subject to IIRIRA's transitional rules; that category of aliens is steadily diminishing in number and will

---

[5] Similar issues are presented in the pending certiorari petition in *Rubio* v. *Ashcroft*, No. 01-547, which also seeks review of a decision of the Ninth Circuit that relied on that court's earlier decision in *Ram*.

be depleted when the aliens complete their administrative proceedings.[6]

In addition, all the courts of appeals that have addressed the temporal scope of IIRIRA Section 309(c)(5) have agreed that that provision requires that the stop-time rule in 8 U.S.C. 1229b(d)(1) be applied, at a minimum, to all suspension of deportation applications adjudicated on or after April 1, 1997.[7] See *Angel-Ramos* v. *Reno*, 227 F.3d 942, 947 (7th Cir. 2000); *Afolayan* v. *INS*, 219 F.3d 784, 788 (8th Cir. 2000); *Rivera- Jimenez* v. *INS*, 214 F.3d 1213, 1217 (10th Cir. 2000); *Gonzalez- Torres* v. *INS*, 213 F.3d 899, 903 (5th Cir. 2000); *Appiah* v. *INS*, 202 F.3d 704, 708 (4th Cir.), cert. denied, 531 U.S. 857 (2000); *Tefel* v. *Reno*, 180 F.3d 1286, 1293 (11th Cir. 1999), cert. denied, 530 U.S. 1228 (2000). There is therefore no conflict in the circuits warranting this Court's review.

2. The court of appeals properly rejected petitioners' claims. IIRIRA Section 309(c)(5) expressly directs that the new stop-time rule in 8 U.S.C. 1229b(d)(1) is to be applied to applications for suspension of deportation in deportation proceedings commenced under old, pre-IIRIRA law. As amended by NACARA,

---

[6] This Court has denied several certiorari petitions raising issues that arise only under the transitional rules of IIRIRA. See *Tefel* v. *Reno*, 530 U.S. 1228 (2000); *LaGuerre* v. *Reno*, 528 U.S. 1153 (2000); *Reno* v. *Goncalves*, 526 U.S. 1004 (1999); *Reno* v. *Navas*, 526 U.S. 1004 (1999).

[7] The Ninth Circuit has held that the new stop-time rule is not to be applied in cases in which the IJ adjudicated the application for suspension of deportation before IIRIRA's general effective date of April 1, 1997. See *Otarola* v. *INS*, No. 99-71405, 2001 WL 1242254 (Oct. 18, 2001); *Guadalupe-Cruz* v. *INS*, 240 F.3d 1209 (2001). This case does not present that issue, because the IJ ruled on petitioners' application after April 1, 1997. See pp. 7-8, *supra*.

IIRIRA Section 309(c)(5) provides that the new stop-time rule "shall apply to orders to show cause * * * issued *before, on or after* the date of the enactment of [IIRIRA]." NACARA § 203(a), 111 Stat. 2196 (emphasis added). Any ambiguity that might have existed in the original language of the transitional rule was resolved by the NACARA amendment, which replaced the phrase "notices to appear" in IIRIRA Section 309(c)(5) with "orders to show cause," the documents that commenced deportation proceedings before the April 1, 1997, effective date of the pertinent provisions of IIRIRA. NACARA also expressly made that amendment effective as if it had been originally enacted in IIRIRA. See NACARA § 203(f), 111 Stat. 2200.

NACARA accordingly makes clear that, for an alien placed in pre-IIRIRA deportation proceedings who is not subject to certain express statutory exceptions not applicable here (see p. 6 note 3, *supra*), the time after which the alien is served with the OSC commencing the deportation proceedings does not count towards the accrual of the seven years of physical presence in the United States necessary for eligibility for suspension of deportation. To be statutorily eligible, the alien must have been present in the United States for at least seven years before he was served with the OSC. Because petitioners had not been in the United States for the requisite seven years when they were served with their OSCs, the BIA correctly concluded that they were ineligible for suspension of deportation.

Petitioners err in arguing (Pet. 11-12) that IIRIRA's transitional rule directs that the new stop-time rule be applied to aliens served with OSCs only in one specific situation—namely, where the Attorney General, acting under the authority of IIRIRA Section 309(c)(2), 110 Stat. 3009-626, elected to apply the new removal pro-

cedures to an alien who had already been served with an OSC, and the alien then applied for cancellation of removal under 8 U.S.C. 1229b. Nothing in IIRIRA Section 309(c)(5) suggests that Congress intended to limit the stop-time rule to such cases. To the contrary, Congress referred to IIRIRA Section 309(c)(5)(A), as amended by NACARA, in that provision's title as the "General" transitional rule regarding suspension of deportation, limited only by specific exceptions enumerated in Sections 309(c)(5)(B) and (C). See NACARA § 203(a), 111 Stat. 2196. As the BIA noted in *Nolasco-Tofino*, Interim Dec. 3385, slip op. 8, the fact that Congress "carefully articulated exceptions to the general transitional rule" reinforces the conclusion that Congress intended to apply the stop-time rule as comprehensively as possible to all past, pending, and future suspension applications not covered by those exceptions.

Petitioners argue (Pet. 13-14) that the court of appeals' reading of the effect of NACARA's amendment of IIRIRA Section 309(c)(5)(A) is faulty because Congress was "clearly aware of the dispute over the interpretation of former [IIRIRA] Section 309(c)(5)," and so, "had Congress wished to make Section 309(c)(5) applicable to suspension of deportation cases, it would have indicated so in the statute without any ambiguities." Pet. 13-14 (citation omitted). That argument is wide of the mark. To the extent that, before enactment of NACARA, IIRIRA Section 309(c)(5) was ambiguous as to whether the stop-time rule applied in pre-IIRIRA deportation proceedings—because IIRIRA Section 309(c)(5) originally referred to "notices to appear," 110 Stat. 3009-627, which did not exist before IIRIRA was enacted and which are issued only in post-IIRIRA removal proceedings—NACARA dispelled that am-

biguity by changing the reference to "order to show cause" rather than "notices to appear." See NACARA § 203(a), 111 Stat. 2196. NACARA therefore resolved the precise issue in this case, by making clear that IIRIRA Section 309(c)(5) is a transitional rule that governs applications for suspensions of deportation in pre-IIRIRA deportation proceedings. Nothing in IIRIRA or NACARA suggests that Congress intended the transitional rule to have a narrower application to only those deportation proceedings commenced before IIRIRA's enactment in which the Attorney General subsequently elected to proceed under post-IIRIRA procedures.

Petitioners also contend (Pet. 15-16) that the court of appeals erred in not addressing whether the application of the new stop-time rule to their cases would contravene the presumption against retroactivity articulated in *Landgraf*. That contention is without merit. In *Ram*, the court correctly concluded that Congress had expressly delineated the temporal scope of the stop-time rule and had directed that it be applied to pre-IIRIRA deportation proceedings. 243 F.3d at 516. The court also correctly observed that, as this Court's decision in *Landgraf* makes clear, when Congress provides that a new federal civil statute is to be applied even in cases arising out of facts predating its enactment, it is unnecessary to examine whether the application of that statute would contravene the traditional, judicially articulated presumption against retroactivity. *Id.* at 516-517 (discussing *Landgraf*, 511 U.S. at 272-273). Thus, even if the application of the stop-time rule to petitioners' cases has the effect of taking away the possibility of receiving a form of relief from deportation for which petitioners previously would have been eligible, the short answer is that Congress expressly

directed that the stop-time rule be applied to cases like this one.[8]

Nor does anything in this Court's decision in *INS* v. *St. Cyr*, 121 S. Ct. 2271 (2001), cast doubt on the correctness of the court of appeals' decision in this case. In *St. Cyr*, the Court concluded that, when Congress in IIRIRA repealed a form of discretionary relief from deportation previously available under 8 U.S.C. 1182(c) (1994), it did not provide any indication of intent to apply that repeal retroactively that was sufficient to bar Section 1182(c) relief to aliens whose removal proceedings were based on criminal convictions based on guilty pleas entered before IIRIRA's enactment. 121 S. Ct. at 2288-2290. The Court emphasized in *St. Cyr* that "[r]equiring clear intent [that Congress intends a law to be applied retroactively] assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits." *Id.* at 2288 (internal quotation marks omitted). The Court noted, moreover, that in some instances in IIRIRA, Congress expressly manifested that it had taken those considerations into account, by requiring that a particular new provision be applied in respect of events that occurred "before, on, or after" IIRIRA's enactment. See *id.* at 2289. In a footnote (*id.* at 2289 n.43), the Court identified various

---

[8] In any event, the facts of this case cast doubt on petitioners' assertion (Pet. 16) that they conceded deportability in reliance on the fact that they could apply for relief from deportation. In fact, petitioners conceded deportability on March 28, 1996, and at that time applied for asylum, not for suspension of deportation, for which they were not then eligible because they were still five months short of accruing the requisite seven years of continuous physical presence. See C.A.R. 47.

provisions of IIRIRA that contain "before, on, or after" language.

The Court's conclusion in *St. Cyr* that Congress's utilization of "before, on, or after" language indicates "unambiguously its intention to apply specific provisions retroactively," 121 S. Ct. at 2289, firmly supports the decision below. IIRIRA Section 309(c)(5)(A), as amended by NACARA, expressly provides that the new stop-time rule applies to OSCs issued "before, on, or after the date of the enactment" of IIRIRA. NACARA § 203(a), 111 Stat. 2196. Congress thus unambiguously demonstrated its intent to apply the statute to matters that occurred before the enactment of IIRIRA.

3. Petitioners contend (Pet. 17-22) that, as applied by the court of appeals, IIRIRA Section 309(c)(5)(A) violates equal protection principles. The gravamen of petitioners' complaint is that the Ninth Circuit has held that the stop-time rule does not apply to aliens whose applications for suspension of deportation were adjudicated by an IJ before April 1, 1997, the general effective date of IIRIRA, see *Otarola* v. *INS*, No. 99-71405, 2001 WL 1242254 (Oct. 18, 2001); *Guadalupe-Cruz* v. *INS*, 240 F.3d 1209 (2001), but that it does apply in cases like this one, where the application was adjudicated on or after that effective date. Petitioners maintain that that distinction is irrational. That challenge is without merit.

When Congress enacted the new stop-time rule in IIRIRA, it necessarily was required to establish an effective date for that rule. Any such effective-date rule is by nature somewhat arbitrary. Had Congress made the stop-time rule effective immediately upon IIRIRA's enactment on September 30, 1996, some aliens whose suspension applications had been post-

poned for unrelated reasons until after that date would have lost the opportunity to apply for suspension.[9] Similarly, had Congress made the stop-time rule effective only in removal proceedings commenced under IIRIRA, and not under old deportation proceedings at all, some aliens would have lost the opportunity to apply for suspension because, for unrelated reasons, the INS did not initiate proceedings against them before April 1, 1997. Under any effective date, some aliens necessarily would lose the opportunity to obtain relief based on reasons external to the merits of their case. In establishing an effective date for a new statute, Congress "must necessarily engage in a process of line-drawing," and "the fact [that] the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration." *United States R.R. Ret. Bd.* v. *Fritz*, 449 U.S. 166, 179 (1980).

Petitioners do not dispute that the stop-time rule itself is rationally related to a legitimate governmental purpose. The rule represents a legitimate congressional policy determination to eliminate a significant incentive on the part of aliens to delay deportation or removal proceedings once they have begun. See *Ram*, 243 F.3d at 513. Petitioners argue that the rationale for the stop-time rule does not apply to them, in that they did not attempt to delay their proceedings. Even if that

---

[9] Had Congress provided that the new rule would apply immediately as of the law's enactment on September 30, 1996, to all deportation proceedings then pending as well as any commenced after that date, the IJ would have been compelled to deny petitioners' application for suspension, which was not even filed until after that date, because petitioners would not have become eligible for relief until October 26, 1996.

point were correct, it would be of no moment.[10] The rational-basis standard does not require Congress to ensure that the basic rationale for the stop-time rule is present in every case to which it applies. See *Heller* v. *Doe*, 509 U.S. 312, 321 (1993) ("[C]ourts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends."). Congress thus validly provided that the stop-time rule be applied to deportation proceedings, like petitioners', that were initiated under pre-IIRIRA law.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

ROBERT D. MCCALLUM, JR.
Assistant Attorney General

DONALD E. KEENER
FRANCIS W. FRASER
Attorneys

NOVEMBER 2001

---

[10] Petitioners argue that they would not have had an incentive to delay their proceedings because there was a "large window of time" in which they were statutorily eligible and could have been granted suspension. Pet. 20. In fact, petitioners did not accrue seven years of continuous presence until October 26, 1996, after the enactment of IIRIRA. At that time and thereafter, petitioners were on notice that legislation had been enacted that, although not yet effective, potentially changed the criteria for eligibility. Nevertheless, petitioners waited until November 27, 1996, to file their suspension applications. C.A.R. 299. Nor did petitioners object when the IJ rescheduled the hearing for June 19, 1997. C.A.R. 54.